(1)

91-1202

No. _____

Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

Ann Richards, Governor of Texas; Selden Hale, III, Mamie Moore Proctor, Hon. Clarence N. Stevenson, Allan B. Polunsky, James M. Eller, F. L. Stephens, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under principles of federalism and Article III of the Constitution, federal courts have jurisdiction to decide unsettled questions of state law involving a dispute between two levels of state government concerning state fiscal policy and a complex regulatory scheme when resolution of the dispute was not necessary to provide relief to the Plaintiff prisoner class in a local jail?

2. Whether a federal court's order, based solely on state law, that the state must compensate one of its political subdivisions is in violation of the Eleventh Amendment when such order is not necessary to provide relief to the prisoner class in a local jail?

3. Whether, under principles of federalism, federal courts should abstain from deciding, or, alternatively, certify to the Texas Supreme Court, unsettled questions of state law involving a dispute between two levels of state government concerning state fiscal policy and a complex state regulatory scheme, when federal judicial intervention in the dispute is not necessary to provide relief to the Plaintiff prisoner class in a local jail and a state court proceeding involving identical issues and identical parties is pending?

4. Whether state officials who have no supervisory responsibility over local jails can be held liable for unconstitutional conditions in a local jail under *Wilson v. Seiter*, ___ U.S. ___, 111, S.Ct. 2321 (1991) because they (1) did not construct or acquire additional capacity in the state prison system beyond that appropriated for by the state legislature and (2) did not further expedite the release of convicted felons in the state prison system, given a context of unsettled state law on their responsibility (if any) for convicted felons in local jails and federal court orders limiting the use of state prison capacity?

5. Whether, under principles of federalism, a federal district court abuses its discretion in setting a constitutional cap in a local jail at design capacity pursuant to state law and previous consent decrees without adopting a "wait-and-see" approach to determine whether, in operating beyond design capacity, jail officials will be deliberately indifferent to the significant human needs of the inmate class?

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No. ____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

ANN RICHARDS, GOVERNOR OF TEXAS, ET AL.
Petitioners

v.

THE SHERIFF OF HARRIS COUNTY, ET AL.
Respondents

v.

LAWRENCE R. ALBERTI, ET AL.
Respondents

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit reviewing the district court's orders finding liability against state officials and ordering state officials to compensate Harris County is attached hereto as Appendix A. *Alberti v. Sheriff of Harris County v. Richards*, 937 F.2d 984 (5th Cir. 1991). The order of the panel denying the state's motion for panel rehearing is attached as Appendix B. The district court's findings of liability against State Defendants are attached as Appendices J and X. The initial order requiring state officials to compensate Harris County is attached as Appendix R. Other district court opinions and orders are attached as Appendices D-Q, S-W and Y.

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1991. A timely filed motion for panel rehearing was denied on October 22, 1991. This petition for writ of certiorari is filed within 90 days of the final judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. *CONSTITUTIONAL PROVISIONS*:

Article III, § 2, cl. 1 in pertinent part:

> The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States . . .

Art. VI, cl. 2

> This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land . . .

Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or presented against one of the United States by citizens of another state; or by citizens or subjects of any foreign state.

B. *STATUTORY PROVISIONS*:

Tex. Code Crim. Proc. art. 104.002 in pertinent part:

> [A] county is liable for all expenses incurred in the safekeeping of prisoners confined in county jails or kept under guard by the county.

Tex. Gov't Code § 499.071 (formerly Tex. Rev. Civ. Stat. Ann. art. 6166a-4) is attached as Appendix Z.

I.

STATEMENT OF CASE

A. PETITION INVOLVES FEDERALISM ISSUES OF NATIONAL SIGNIFICANCE

This controversy swirls around whether Texas prison officials and the Governor of Texas (hereinafter "State Defendants") bore any liability, especially financial liability, for felons sentenced to the state prison system but confined and maintained in the Harris County jail. State Defendants do not dispute the Fifth Circuit's analysis that this is "*exclusively*" a state law issue and that it presented a "*hard question*" for the court. Appendix ("App.") A 18. Rather State Defendants maintain that federal courts, especially in a suit between two different levels of state government and involving complex

state regulatory policies, lack authority to decide these "*hard questions*" of "*exclusively*" state law. This is especially so since the dispute involved primarily the fiscal question of compensation to the counties which should only have been resolved on the terra firma of Texas politics in the Texas legislature. At the very least, under abstention doctrine, federal courts should have deferred to state courts to avoid decision on the difficult constitutional questions concerning State Defendants' liability under the Eighth Amendment and their immunities under the Eleventh Amendment. State Defendants also challenge the ruling below setting the constitutional capacity of the Harris County jail as its design capacity.

Litigation concerning prison and local jail overcrowding is tragically chronic in our society. The proper role of federal courts in resolving those disputes is therefore of profound importance to the nation.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

These issues arise from *Lawrence Alberti v. The Sheriff of Harris County*, No. 72-H-1094, Southern District of Texas, a class action suit alleging constitutional violations brought under 42 U.S.C. § 1983 by prisoners in the Harris County (Houston) jail against the Sheriff of Harris County, certain of his employees and the members of the Harris County Commissioners Court (hereinafter "County Defendants"). County Defendants in early 1989 filed a Third Party complaint against Petitioners herein seeking to have the Texas Department of Corrections ("TDC" now called the Texas Department of Criminal Justice-Institutional Division or "TDCJ-ID") accept inmates sentenced to TDC but awaiting transfer in the Harris County jail.

On September 25, 1989, the *Alberti* court, determining the merits-liability aspect of the case,[1] found the jail unconstitu-

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[1]The Fifth Circuit had previously ordered "the transfer, to the judge

(footnote continued on next page)

tional and on the basis of its interpretation of *state law*, held State and County Defendants jointly liable for its unconstitutionality. App. X 29. On February 7, 1991 the *Alberti* court ordered the transfer to other county jails of certain prisoners ready for transfer to TDCJ-ID. These inmates were to "continue to be Harris County prisoners," but, under the terms of the order, Harris County was to be compensated by State Defendants (at a rate up to $40 per inmate per day) for expenditures incurred as a result of the transfers. App. R 6. The district court went on to rule that in light of the unsettled nature of state law the assessment of costs was "tentative" and "contingent" upon the outcome of state court litigation and whether sentencing alternatives were implemented in Harris County. App. R 7.[2]

The Fifth Circuit provisionally approved the decision of the lower court but remanded for findings in light of *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321 (1991).[3] To date, State Defendants have deposited *$6,750,000* into the registry of the district court. App. R 6; App. N; App. K; App. J 1; App. H; App. G 2; App. F; App. E 2. County Defendants have requested the deposit of an additional *$4,572,285.25*. It is not known whether this represents the total amount which the taxpayers of the State of Texas must pay, without state legislative authoriza-

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(footnote continued from previous page)
presiding over the *Ruiz* case [*Ruiz v. Collins*, No. 78-H-987-CA (S.D. Tex., Houston Div.), the state prison conditions case], of so much of the remedy portion of the *Alberti* third-party action . . . as seeks to enjoin them to receive or take prisoners to TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities." *In Re Clements*, 881 F.2d 145, 153 (5th Cir. 1989).

[2]In a Memorandum Opinion, the *Ruiz* court indicated it would have abstained on the issue of compensation to the counties. App. S.

[3]The district court has entered an order finding deliberate indifference and thus liability against State Defendants. App. J. That finding is currently the subject of a consolidated appeal in the Fifth Circuit styled *Alberti v. Sheriff of Harris County v. Richards*, Fifth Circuit Nos. 91-2946, 91-6062, 91-6206.

tion, to their own political subdivision pursuant to orders of the federal judiciary.

C. STATEMENT OF FACTS

1. State Law Prior to H.B. 93[4] Was Unsettled as to Liability and Financial Responsibility of State Defendants For Transfer Eligible Inmates in Harris County Jail

It is difficult to seriously contend that state law before August of 1991 was settled as to the liability or financial responsibility of State Defendants for prisoners in local jails. Two sections of the Local Government Code, TEX. LOCAL GOV'T CODE §§ 351.001 (Vernon Supp. 1992) and 351.041 (Vernon 1988), vest responsibility for county jails in the county commissioners courts and the sheriffs, respectively. Moreover, prior to August of 1991, state statutory law was unequivocal in making the counties financially responsible for all prisoners in their jails:

> "[A] county is liable for *all* expenses incurred in the safekeeping of prisoners confined in county jails or kept under guard by the county."

TEX. CODE CRIM. PROC. art. 104.002 (Vernon Supp. 1992) (emphasis added). In fact, prior to August 1991, the Texas Legislature had on three occasions failed to pass bills to compensate Texas counties for holding convicted felons, as well as a constitutional amendment and accompanying legislation to require the State to reimburse local governments for any new State mandates. See State Defendants' Exhibits 4-8, introduced at the trial of October 22, 1990 and testimony at that trial transcript [tr.] vol. 1, pp. 122-124. Nor, prior to August 1991, had the legislature appropriated money for compensating the counties for holding such prisoners. *See* TEX. GEN. &

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[4]Vernon's Tex. Sess. Laws 1991, 2d Called Sess., Ch. 10, pp. 180-226 (hereafter, "H.B. 93") (eff. August 29, 1991).

SPECIAL LAWS 1989, Reg. Sess., Ch. 1263, pp. 5184-5200 (eff. June 16, 1989). The lack of appropriations to compensate the counties is evidence of the intent of the legislature, *see Bullock v. Calvert*, 480 S.W.2d 367, 370-71 (Tex. 1972); TEX. CONST., Art. VIII, § 6 (funds may not be drawn from the State treasury without a specific appropriation therefor). Under the state constitution, the legislature has plenary power over the counties. *See* TEX. CONST., Art. IX, § 1; *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915, 919-20 (1925); *Bass v. Fontleroy*, 11 Tex. 698, 706 (1854).

And while the district court attributed the unconstitutional conditions in the Harris County jail to a failure of TDCJ-ID to meet a state-law duty to accept inmates sentenced to it, *See* App. X 29, state law is explicit and abundantly clear that the state prison system has a duty to accept inmates "*only*" pursuant to former Tex. Rev. Civ. Stat. Ann. art. 6166a-4,[5] *see* App. Z, which requires the Texas Board of Criminal Justice to "develop, adopt and enforce an allocation formula" that allocates admissions to TDCJ-ID.[6] *See* TEX GOV'T CODE § 499.121 (Vernon Supp. 1992). In fact, repeatedly the district court ordered the State Defendants to "maintain" the allocation formula,. App. R 8; App. U 3; App. V 3, and acknowledged it was "adopted by State Defendants to protect the integrity of *Ruiz* [state prison conditions case, see *supra at* 5 n.1] orders and agreements." App. R 5.

2. Allocation Formula Was Lynchpin of Reforms Aimed at Controlling Local Jail and Prison Overcrowding.

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[5]Now codified as TEX. GOV'T CODE § 499.071 (Vernon Supp. 1992).

[6]This regulation is codified as Chapter 152 in Title 37 of the Texas Administrative Code (37 TAC §§ 152.1-152.3) (*See* App. AA for pertinent parts of the regulation). Under the current formula 149 inmates per week may be admitted from Harris County. *See* 16 Tex. Reg. 5261 (September 24, 1991).

The allocation formula was a component of H.B. 2335, the Comprehensive Criminal Justice Reform Act, TEX. GEN. & SPECIAL LAWS 1989, Reg. Sess. Ch. 785, pp. 3471-3558 (generally eff. September 1, 1991). Aside from insuring compliance with *Ruiz*, State Defendants have long maintained -- and the legislative history shows -- that H.B. 2335's primary purpose was to establish a system of financial incentives and disincentives directed at controlling front-end population pressures by providing state financing for sentencing alternatives while at the same time forcing local governments to fund the cost of their own transfer-eligible inmates.[7] State Defendants' Exhibit 49, trial of the week of August 14, 1989, the Report of the Texas House Appropriations Subcommittee on Prison Construction Alternatives (January 30, 1989), esp. at 10 (noting that the state of Texas should develop "a hard core bed allocation system for local governments" and "a system to discourage local governments from sending criminals to the hard-core beds owned and operated by the state . . . beyond the allocation system"). Thus, the recent Report of the *Alberti* Special Master aptly summarized H.B. 2335 by saying at 4 that it "institutionalized the allocation formula, with its explicit cap on admissions to TDCJ, and encouraged the development within the counties of a wide range of both institutional and community-based alternatives to incarceration for a broad class of sentenced felons convicted of essentially non-violent offenses."

It must be noted that State Defendants have consistently and persistently maintained that Harris County underutilizes

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[7]Texas has, of course, also maintained an aggressive prison construction program that is almost unprecedented in scope: "Since 1984, the State has brought 22,299 new prison beds on line, 13,270 of them in 1989 and 1990. In 1989, the State further committed itself to the construction of 15,550 more beds. . ." *See* Report of December 13, 1991 by the *Alberti* Special Master on Harris County sentencing practices (hereinafter "Report of *Alberti* Special Master", copies lodged with Clerk of the Court) at 3. In addition, H.B. 93, Sec. 22.03, p. 224, appropriated $672,100,000 for the construction of 25,000 additional beds. This makes a grand total of 62,849 beds either built or funded for construction since 1984.

intermediate sanctions and takes a disproportionate number of state prison beds. *See*, trial of week of August 14, 1989, tr. vol. 3, pp. 534-572.[8] The Report of the *Alberti* Special Master on Harris County's sentencing practices has confirmed this. (*See* copies lodged with the Clerk of the Court.) Especially in light of these facts, State Defendants have contended that the allocation formula should not have been overridden, so that it would have had its natural effect of encouraging the use of sentencing alternatives in Harris County, as the Texas legislature intended.

3. State District Court Judgment Relied on By the Fifth Circuit Has Been Vacated Without Ever Being Reviewed By State Appellate Court, Let Alone Affirmed

Both the Fifth Circuit and the district court sought to resolve these complex issues of state law by reliance on § 1.02 of H.B. 2335[9] resting "primary responsibility" in TDCJ for "the confinement, supervision and rehabilitation of felons." App. A 24-25; App. X 29. In doing so, the Fifth Circuit noted its reliance on the only state district court to have addressed the issue. App. A 25-26.

However, the state cases[10] raised not only complicated issues of state court jurisdiction and complex factual issues but overarching separation of powers issues under Article II § 1 of

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[8]*See Also* Affidavit of Steve Martin (with summary) concerning the Harris County criminal justice system, admitted into evidence at the trial of February 27, 1990 as part of State Defendants' Exhibit 17 (copies lodged with the clerk of the Court).

[9]Now codified as TEX. GOV'T CODE § 493.001 (Vernon Supp. 1992).

[10]*County of Nueces v. Texas Board of Corrections*, No. 452,071 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, pending); *Harris County v. State of Texas*, No. 465,468 (Dist. Ct. of Travis Co., 126th Judicial District of Texas, pending). Both of these were decided by the same state district court judge.

the Texas Constitution.[11] Moreover, under state law, because state entities were involved, the state court judgment on appeal (*Nueces County*), was superseded or automatically stayed. *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 481-82 (Tex. 1964). Before that case could be argued, let alone decided on appeal, the counties involved, as well as Harris County, agreed to vacate their judgments and settle pursuant to H.B. 93. *No state appellate court, let alone the Texas Supreme Court, has ever ruled on the issues presented to and decided by the Fifth Circuit.*

4. Legislative History of H.B. 93 and State Court Settlements Indicate State Was Liable for Prisoner Transfers Only After October 1, 1991

After intense lobbying by Texas counties, the Texas Legislature in August, 1991 passed H.B. 93, a law which provides for compensation to the counties for housing inmates sentenced to TDCJ-ID at amounts specifically set by the Legislature. TEX. GOV'T CODE § 499.122-499.125 (Vernon Supp. 1992). Moreover, as of October 1, 1991 a mechanism was established for transferring, at state expense, inmates to other county jails when a county jail has been declared unconstitutionally overcrowded and over 20 percent of its population is made up of inmates awaiting transfer to TDCJ-ID. TEX. GOV'T CODE § 499.125 (Vernon Supp. 1992). The legislative history of H.B. 93 indicates that an earlier version of H.B. 93 contained a provision that would have allowed compensation under state law from February 7, 1991, the date of the *Alberti* court's original order. S.B. 24 (introduced in the First Called Session) § 14.02, p. 34, proposing Tex. Gov't Code § 499.123(b) (*see* copies lodged with the Clerk of the Court). That provision was dropped, indicating that the Legislature's

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[11]Copies of State Defendants' Brief in *Texas Board of Criminal Justice, et al v. Nueces County, et al.*, No. 3-90-282-CV (3rd Court of Appeals - Austin, Texas) have been lodged within the clerk of the court for the Court's convenience.

intent was not to compensate Harris County prior to October 1, 1991. *Smith v. Baldwin*, 611 S.W.2d 611, 616-17 (Tex. 1981).

In order to qualify for the provisions allowing compensation, a county had either to dismiss its state court suit or settle. TEX. GOV'T CODE § 499.126 (Vernon Supp. 1992). Harris County entered into a settlement agreement (copies lodged with Clerk of the Court) consistent in all respects with H.B. 93. Hence, with the passage of H.B. 93, Harris County entered into a court settlement allowing transfer payments only after October 1, 1991 pursuant to the provisions of H.B. 93. Still, despite the language of the district court that the assignment of costs was "contingent" on the outcome of the state court litigation, the lower courts continue to require State Defendants to compensate Harris County for inmates transferred prior to October 1, 1991 and in derogation of the provisions of H.B. 93.

5. County Had Full Authority and Ability to Provide Remedy to Inmate Class.

It is indisputable that the County had and still has full authority under Texas law to contract with other counties and transfer prisoners out of its jail to detention facilities in those counties. Tex. Gov't Code Ch. 791 (*see* esp. § 791.003 (3)(A)), enacted by Vernon's Tex. Sess. Laws 1991, Ch. 38, § 1, pp. 461-466 (eff. September 1, 1991), superseding Tex. Rev. Civ. Stat. art. 4413(32c); TEX. LOCAL GOV'T CODE §§ 351.031-351.035 (Vernon 1988); Ch. 351, Subch. F & G (Vernon Supp. 1992); *see also* TEX. GOV'T CODE § 511.012(b) & (c) (Vernon 1990). Nor has there been any contention that the County lacked the financial resources to have made the contracts.

6. Constitutional Caps Are Set At Design Capacity (Based on State Law and Previous Consent Decrees) Not Constitutional Capacity, Which

Both the *Alberti* Special Master and State Expert Testified Was Substantially Higher.

The district court ruled that the design capacity (4,698 inmates) of the jail was its constitutional capacity because of the "poor physical design" of the jail and the lack of a "second means of egress from the Detention Center."[12] App. X 22. The *Alberti* Special Master testified that the 100 percent of design capacity limit was based on state statutes and the 1975 consent decree. *See*, trial of week of September 12, 1989, tr. vol. I, pp. 162-63, 165. These standards do not, according to the Special Master, necessarily establish a constitutional standard. *Id.* at 163-164. In fact, at a subsequent hearing, the *Alberti* Special Master testified that, although there was no special science to determining constitutional capacity levels, 5,500 to 6,000 was a range within which "we can hope" the county officials could operate the jail so as not to "trample on the constitutional rights of the prisoners." *See*, trial of week of August 14, 1990, tr. Vol. II, p. 14.

This testimony was corroborated by the state's expert, who explained that design capacity bears little relationship to constitutional capacity. For example, the *Ruiz* court orders routinely allow the Texas prison system to double-cell in forty-five square foot cells obviously designed only for one, allowing a significantly higher density standard for prisons under federal court order in Texas (long-term detention) than for jails (short-term detention) under state law. *See*, trial of week of August 14, 1989, tr. Vol. III, pp. 511-517. As a result, some units in Texas operate at 150 percent of design capacity under *Ruiz* court orders. *See*, trial of week of August 14, 1989, tr. Vol. III, p. 515. Similarly, the California system, which also is designed on a single-cell basis, can operate at 150 or 160

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[12]Harris County has added a second means of egress (firestairs) at the detention center. *See* County Defendants' Harris County Judge's, Harris County Commissioners' and Harris County Sheriff's Response and Objections to Monitor's July 23, 1990 Final Findings of Fact at 5.

percent of design capacity apparently without constitutional problems. *Id.*

By contrast, the Harris County central jail single-cells at least 30 percent of its population in fifty-square-feet cells which are larger than many cells at TDCJ-ID that are commonly double-bunked. *See* State Defendants' offer of proof of March 1, 1990; *see also* H.B. 93, Section 13.01, p. 208, amending Tex. Local Gov't Code § 351.006(d). It is not surprising, then, that after his third tour of the jail, the State's expert testified that the Harris County jail could be constitutionally managed at a population ranging between 5,500-6,000, the same as the *Alberti* Special Master's suggested range. *See*, trial of week of August 14, 1990, tr. vol. II, p. 78.

In fact, the *Alberti* court for the period of February 7, 1991 to December 2, 1991, routinely maintained a cap of 6,300. App. R 6; App. P 3; App. I 2. Subsequent orders indicate, however, that design capacity will be the trigger for H.B. 93 transfers from Harris County facilities in existence at the time of trial and likely will be the constitutional capacity for new facilities even though no hearing was even held on their constitutional capacity. App. D; App. E.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT.

A. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IRRECONCILABLE CONFLICT BETWEEN THE CIRCUITS OVER (1) THE ROLE OF FEDERAL COURTS IN DECIDING DISPUTES BETWEEN DIFFERENT LEVELS OF STATE GOVERNMENT AND (2) THE SCOPE OF THE ELEVENTH AMENDMENT.

This case arose in the context of an internal political dispute between the Texas legislature and the counties of Texas over whether counties should be compensated for housing inmates ready for transfer to the state prison system. Prior to the passage of H.B. 93, that debate raged in the Texas legislature, often between representatives of the state's rural and urban counties:

> Without reducing to a disagreement between you and I individually, kind of globally the problem with that is, you have judges in Harris County that are making decisions that raise my taxes, as he indicated earlier. And we've gone to an extensive amount of time and trouble to try to establish this. Harris County has about 19[13] percent of the State's population, produces about 20 percent of the State's tax revenue stream. It consumes 28 to 30 percent of the prison resources.
>
> When your locally elected judge in Harris County makes a decision about what to do with the criminal, in excess of that 20 percent, taxes in Dallas and Bexar and Parker County go up to pay for that decision . . .

Meeting of the Appropriations Committee of the Texas House on February 21, 1991, Remarks by Representative Ric Williamson of Parker County (Weatherford) in colloquy with Representative Paul Hilbert from Harris County (Houston) (transcript of remarks lodged with the Clerk of the Court).

The Fifth Circuit showed no hesitancy to intrude directly into the center of this political dispute, likening its orders to a "lion in the street" when the Texas legislature passed H.B. 93 in August, 1991. App. B 3. And, *after* deciding the "*hard questions*" of "*exclusively*" state law against Texas, the

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[13]The evidence in this case indicates 16 percent. See Affidavit of Steve Martin (lodged with the clerk of the Court) at 22.

Fifth Circuit found the state to be a constitutional violator, thereby sidestepping, without discussion, its authority to decide the state-law dispute in the first place. App. A 35 n.8. This merely begs the question: Did the Fifth Circuit have authority under Article III[14] and principles of federalism to decide a state-law dispute between two state governmental entities?

In contrast, to the Fifth Circuit's approach -- headlong into the melee -- the Sixth Circuit has ruled under principles of federalism that federal courts lack authority "to adjudicate an internal dispute between a local governmental entity and the very state that created it." *Kelly v. Metropolitan Board of Education of Nashville and Davidson County, Tennessee v. State of Tennessee*, 836 F.2d 986, 998 (6th Cir. 1987), *cert denied*, 487 U.S. 1206 (1988). And, again in contrast to the Fifth Circuit's approach, numerous decisions of this Court and the Circuit courts have ruled that local governmental entities lack standing to bring an action in federal court against their creator.[15]

The reasoning of the Sixth Circuit rests primarily on a prudent and pragmatic deference[16] to state governments in finding their own means of funding a remedy when a constitutional violation occurs:

> Again, however, the existence of a duty to eliminate [the constitutional violation] does not mean that the duty may only be discharged through taxes levied by the state, as opposed to taxes levied by the counties of the state. This

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[14]If Congress cannot tell a state where to locate her capital, how, under Article III, can a federal court tell a state that it must compensate its counties? *See Coyle v. Smith*, 221 U.S. 559 (1911).

[15]*E.g., Coleman v. Miller*, 307 U.S. 433, 441 (1939); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984) (and cases cited therein).

[16]State Defendants maintain, of course, that this deference is anchored in the Constitution, including the Tenth and Eleventh Amendments.

> "constitutional wrongdoers must pay for their wrongs" argument has little or no force where we are talking about two political entities, a state and one of its subdivisions, each of which has done wrong (as have subdivisions not now before us) and where the men and women representing the electorate of the state as a whole -- an electorate that includes the voters of all subdivisions -- have chosen not to enact legislation shifting to the state as a whole the costs of repairing the wrongs within each subdivision.

Kelly, 836 F.2d at 998. In fact, this Court has traditionally shown great deference to the states in regards to issues that involve statewide systems relating to the fundamental structure of the state's fiscal and taxing policies, public administration and local initiative. *See e.g.*, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40-41 (1973). *Kelly* relied on *Rodriguez* heavily in its reasoning. *Kelly*, *supra* at 996-997.

Yet here, federal courts construed, without authoritative state court interpretation, § 1.02 of H.B. 2335 as carte blanche authority to acquire at state taxpayers' expense a special prison system for one locality, despite that locality's disproportionate use of state prison space. This federally ordered, but state financed, capacity acquisition required expenditures beyond the funding appropriated by the Texas legislature for construction and acquisition of prison capacity. This is simply not the office of federal courts:

> Such fundamental decisions as how many prisons to build and how large to build them -- basic decisions regarding the allocation of public resources are simply outside the domain of federal courts.

Inmates of Occoquan v. Barry, 844 F.2d 828, 843 (D.C. Cir. 1988).

Similarly, the Fifth Circuit's willingness to enter into the fray and decide "*hard questions*" of "*exclusively*" state law against the State Defendants led it to conclude that the money payments to the County were incidental to injunctive relief. App. A 35. Bootstrapping again its state law decision, it sought to distinguish *Kelly* by ruling that the state was a "current constitutional violator." App. A 35. But as noted above, this distinction begs the question. *Kelly* rests primarily on the proposition that it is not the province of federal courts to decide at all that kind of state-law dispute between different state subdivisions. Rather, relying on *Rodriguez*, *Kelly* would leave such matters to the state political process, *Kelly*, *supra* at 996-997, and not engage in an "'end-run around the . . . legislature's allocation of state funds'." *Kelly*, *supra* at 995 *citing United States v. Texas Education Agency*, 790 F.2d 1262, 1265 (5th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987).

Accordingly, *Kelly* found, under Eleventh Amendment analysis, that "[t]he order to pay is ancillary only to itself" *Kelly*, *supra* at 992, and, as such, violated settled precedents holding that, "[w]hen the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Kelly*, *supra* at 988-89 citing *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945); *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984). This in turn is consistent with long-standing case law counseling, under Eleventh Amendment analysis, non-interference with the fiscal affairs of of states. *See e.g., Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946).

The reasoning of the *Kelly* case applies with particular force where, as here, vindication of the constitutional rights of the Plaintiffs could have been achieved without involving the

state at all, while leaving the local governmental entity free to pursue its relief before the state legislature or in state court.

> It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states. "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that *such relief should be denied in every case where the asserted federal right may be preserved without it."*

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298 (1943), *quoting Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). (emphasis added)

Especially in an era of tightening budgets, the role of federal courts in resolving fiscal disputes between different levels of state government raises fundamental questions of federalism. Hence, the irreconcilable conflict between the Fifth Circuit and other circuits as to how to approach this problem is important, and this Court should resolve it.

B. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE LOWER COURT'S CLEARLY ERRONEOUS AND ILL REASONED RULING ON ABSTENTION.

1. Abstention Was Especially Appropriate Because of Ongoing State Court Proceedings Dealing With Undecided Issues of State Law.

Few cases cry out so much as this one for some principled discussion of federalism, particularly this Court's decision in *Railroad Commission v. Pullman*, 312 U.S. 496 (1941). Although acknowledging that this case presented a "*hard ques-*

tion" of "*exclusively*" state law, App. A 18, the panel was simply flat-footed on abstention, noting only that it did not "quite fit", App. A 35, despite this Court's clear message that such stingy judicial "pigeonholing" is not appropriate in abstention analysis. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987). Judge Higginbotham, no novice at federalism, has himself noted, in a case which formed the gravamen of his analysis here, that if there is "real ambiguity" about statutory intent or state law, "strong" grounds for *Pullman* abstention exist. *Bush v. Viterna*, 795 F.2d 1203, 1205 n.1 (5th Cir. 1986).

There can be little question, especially in light of H.B. 2335 and the allocation formula, that at the very least there was "real ambiguity" as to whether or not the intent of state law was for TDCJ-ID or other state entities to assume responsibility for transfer-eligible inmates in local jails prior to the passage of H.B. 93. Certainly, given the stakes of the state law dispute in terms of the state's criminal justice policies, its relationship with its counties[17] and the obvious fiscal implications for the state, abstention under *Pullman* was appropriate.[18]

The argument for abstention is especially compelling in light of the pendency of a state court action involving the identical state and county parties. *See Pennzoil Co. v. Texaco,*

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[17]Even assuming *arguendo* federal courts have authority to resolve a state law dispute between two state governmental entities, abstention would still seem the better course. Deference to state institutions is especially appropriate, "when it is proposed that the remedial powers of the federal courts be exercised 'to restructure the operation of local and state governmental entities.'" *Kelley*, 836 F.2d at 1000, *citing Hills v. Gautreaux*, 425 U.S. 284, 293, (1976). *See also Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) ("the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs").

[18]Because this is a Texas case, the proper course was to dismiss State Defendants or at least any claims relating to State Defendants' liability and financial responsibility for transfer-eligible inmates in the Harris County jail. *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 88-89 (1975).

Inc., 481 U.S. 1 (1987); *Younger v. Harris*, 401 U.S. 37 (1971). In fact, "wise judicial administration" would have counseled in favor of dismissing State Defendants to conserve the resources of the courts and the parties. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976).

The Fifth Circuit's "deference" to these ongoing state court proceedings and the district court's "contingent" enforcement of its orders, *see* App. A 26, App. R 27, are a far cry from the considerations of federalism embodied in the abstention doctrine. Here those state court proceedings had either been "superseded" or stayed on appeal[19] (as in *County of Nueces*) or had not even been fully litigated in the trial court. Litigants should not be able to use a federal court to make an end run around normal state judicial processes. *See Pennzoil*, 481 U.S. esp. at 13-14. Nor should they disrupt the ordinary process of trial or appeal in state court by adjudicating a civil rights case in which the federal constitutional claims are "inextricably intertwined with the state court's grant or denial of relief." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-84 n.16 (1983).

Moreover, the whole idea of "contingent" liability raises the very justiciability problem which the *Pullman* doctrine was designed to avoid:

> When federal courts interpret state statutes in a way that raises federal constitutional questions,

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[19]The basis for the automatic stay on appeal was precisely because the judgment was against a state entity and issues of sovereign immunity were implicated. *Ammex*, 381 S.W.2d at 481-82. Given this Court's decision in *Pennhurst*, it would have seemed particularly advisable under the Eleventh Amendment to have deferred to the normal state practice set forth in *Ammex*. *Cf. Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989) (considerations based on the Eleventh Amendment can be applied in other contexts involving the constitutional balance between states and the federal government). Non-interference with the stay and normal state court process was also mandated by 28 U.S.C. § 2283.

> "a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time -- thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless."

Pennzoil, 481 U.S. at 11, *citing Moore v. Sims*, 442 U.S. 415, 428 (1979). And here that prophecy has been sadly fulfilled, for the entire state-law basis of the Fifth Circuit's opinion has evaporated with the vacation of the judgments in state court pursuant to the settlement of the state court actions under H.B. 93.

2. Abstention was Appropriate to Avoid Disruption of State Regulatory Programs.

The lower courts' assumption of jurisdiction over the claims against State Defendants also violated the doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), which calls for abstention when such jurisdiction interferes with a complex state regulatory scheme. *See also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (federal courts must abstain to avoid adjudication that would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern").

Requiring State Defendants to finance the housing of transfer-eligible inmates in other counties implicated (and, in fact, undermined), the important public policy objectives of the allocation formula under H.B. 2335 by *de facto* giving Harris County additional numbers above its current allocation.[20] It also went at cross-purposes to the manifest intent of H.B. 2335 to encourage the use of intermediate sanctions and alternatives to incarceration because it removed from Harris County the

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[20]The allocation formula is, of course, subject to state court judicial review under the Texas Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a § 12 (Vernon Pamph. 1992).

financial burden of supporting inmates sentenced to state prison in excess of Harris County's allocation.[21]

In fact, the entire process of federal review in this case involves consideration of a wide variety of public policy decisions in the Texas criminal justice system which are discretionary in nature. These include (but are not limited to) how many prison beds to construct, how many to contract for, how much good time to award (either under the Prison [or Population] Management Act [PMA],[22] or by prison officials), or how many inmates to furlough. These discretionary decisions were all the subject of state court review in both the *Nueces* and *Harris* county actions. And all of these functions and decisions implicate matters of substantial public concern and involve an attempt to maintain a coherent, state-wide criminal justice policy. Federal courts, accordingly, should have refrained from reviewing these issues under a hybrid *Burford-Younger* type of abstention. *Cf. Pennzoil*, 481 U.S. at 11-12 and 15-17 (justifying abstention in light of Art. I, § 13 of the Texas Constitution, the "open courts" provision).

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[21]In addition, requiring State Defendants to pay the costs of contracts with private vendors or counties for jail space interfered with or superseded the bidding process for such contracts required by TEX. GOV'T CODE § 495.003 (Vernon Supp. 1992).

Moreover, the order circumvented the 1987 Appropriations Act which limited the number of beds that the State could contract out for under former article 6166g-2 (Vernon's Texas Civil Statutes) to 2,000. TEX. GEN. & SPECIAL LAWS 1987, 2d Called Sess., Ch. 78, paragraph 49, p. 343 (eff. August 6, 1987). Before H.B. 93, there were no additional appropriations to allow the TDCJ-ID to contract out for more beds, nor any change in the 1987 rider limiting the number of beds. And as the testimony showed at the hearing in this case of the week of August 14, 1989, TDCJ-ID had already contracted out for all 2,000 beds. See tr. vol 4, pp. 674 & 746.

[22]Formerly codified as Tex. Gov't Code, Ch. 498, Subch. B, now re-codified as Tex. Gov't Code, Ch. 499, Subch. B, by Vernon's Tex. Sess. Laws 1991, Reg. Sess., Ch. 16, Section 10.01, pp. 301-304 (eff. August 26, 1991), amended by H.B. 93, Section 17.02, pp. 215-217.

The PMA was itself the subject of a state constitutional attack in Texas courts. *See* Appellants' Brief in *County of Nueces* case (lodged with the Clerk of the Court) at pp. 37-38.

3. If Abstention Was Not Appropriate, the Fifth Circuit Should Have Stayed Further Action Against State Defendants While Certifying the Relevant Questions of Law to the Texas Supreme Court.

Certainly, if abstention for some reason was not appropriate, the Fifth Circuit should have certified the relevant questions concerning the State's liabilities and financial responsibility to the Texas Supreme Court in accordance with TEX. R. APP. P. 114. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (certification appropriate in light of the "great unsettlement" of state law).

C. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF, IN THE CONTEXT OF UNSETTLED STATE LAW AND FEDERAL COURT ORDERS IN THE STATE PRISON CONDITIONS CASE, STATE OFFICIALS WITH NO SUPERVISORY AUTHORITY OVER LOCAL JAILS ARE LIABLE UNDER *WILSON V. SEITER* FOR CONDITIONS OF CONFINEMENT IN A LOCAL JAIL BECAUSE THEY (1) DID NOT CONSTRUCT OR ACQUIRE MORE BEDS THAN THE LEGISLATURE APPROPRIATED FUNDING FOR AND (2) DID NOT EXPEDITE THE RELEASE OF MORE CONVICTED FELONS.

In analyzing State Defendants' liability under *Wilson v. Seiter*, the Fifth Circuit found that there was "no doubt that the relevant state officials knew that ready felons were being backlogged despite the objectively cruel conditions in the county's jails." App. A 30. However, there is nothing in the record to suggest that state officials on the prison board or the Governor had even inspected the Harris County Jail, let alone knew of conditions there prior to the time of trial in September 1989

when the state's expert toured the jail. Certainly there is no state law vesting any direct supervisory authority in state officials for conditions in the local jail. Absent a showing of direct supervisory responsibility over local jails, state officials should not be held liable for conditions in those jails. *Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976); *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986).

Moreover, since State Defendants' duties under state-law are at best unsettled, that lack of clarity is itself an insurmountable obstacle to a finding of the requisite mental state under *Wilson v. Seiter*. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (state officials liable for monetary damages only if their conduct violates "clearly established . . . constitutional rights of which a reasonable person would have known"), *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (in order to overcome qualified immunity "unlawfulness must be apparent").

Still, the Fifth Circuit moved forward with its analysis under *Seiter*, positing two methods in which State Defendants could have fulfilled its obligations despite the existence of constrictions on the state system under *Ruiz*.[23] App. A 30. First, state prison officials and the Governor could have simply built or contracted for more beds. *Second*, state prison officials and the Governor could have expedited the release of more *convicted felons* under the Prison Management Act to ease overcrowding at the local level, thereby providing more room for the county's *misdemeanants* and *pretrial detainees*.

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[23]Under *Ruiz* State Defendants must maintain system-wide capacity at 95%. *See*, trial of week of August 14, 1989, tr. vol. 4, p. 661. This is, however, a court-ordered capacity level, not a design capacity. See *supra* at 12-13. There is no dispute that TDCJ-ID operated at or near its court-ordered capacity at all times. *Id. Ruiz* orders, of course, take precedence under the Supremacy Clause (Article VI, cl.2) over any state law duty to accept inmates. *See U.S. v. District of Columbia*, 897 F.2d 1152, 1156 (D.C. Cir. 1990) (court-ordered population caps override statutory obligation to accept inmates); *see also Cooper v. Aaron*, 358 U.S. 1 (1958).

As to the first method, expansion of capacity, TDCJ has vigorously carried out its legislative mandate to expand state prison capacity[24] up to the limits of its appropriations. *See*, trial of week of August 14, 1989, tr. Vol. 4, pp. 741-760; trial of week of February 27, 1990, tr. Vol. 1(A), pp. 184-193, esp. 193. There were thus no unspent appropriations for the additional military-style boot camps or tent cities suggested by the Fifth Circuit. App. A 30. This is also true for contracted capacity. *See supra* at 22 n.21. *Wilson v. Seiter* left open the issue of a "cost" defense based on the inability to obtain funding. *Seiter*, ___ U.S. at ____, 111 S.Ct. at 2326. This Court, on the specific facts of this case, must now affirm such a defense because the Texas Legislature specifically resolved under H.B. 2335 to build a set number of beds and allocate that capacity. Under the Eleventh Amendment and principles of federalism, federal courts may not interfere with such basic resource allocation decisions of state government. *See Pennhurst*, 465 U.S. at 101; *Inmates of Occoquan*, 844 F.2d at 843. Moreover, *Ruiz* court orders (*see* "Crowding Stipulation", Section IV. D., State Defendants Exhibit 24, trial of week of August 14, 1989) prohibit the use of temporary housing[25] such as tent cities, and efforts to modify those orders have proved unsuccessful even under the flexible standard adopted by this Court in *Rufo v. Inmates of Suffolk County Jail*, No. 90-954, __ U.S. __ (1992). *Ruiz v. Lynaugh*, 811 F.2d 856, 857 & 862 (5th Cir. 1987).

The second method, expediting the release of convicted felons by awards of good time thereby enlarging the parole eligible pool, raises issues of a more pragmatic but troubling nature regarding public policy decisions in the state criminal justice system. Use of the Prison (or Population) Management

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[24]62,849 beds have been built or funded for construction since 1984. See *supra* at 8 n.7.

[25]In addition, state law currently prohibits the use of temporary housing. TEX. GOV'T CODE § 501.111 (Vernon Supp. 1992). It would seem that what type of prisons to construct, like how many to build and how large to build them, are basic resource decisions "simply outside the domain of federal courts." *Inmates of Occoquan*, 844 F.2d at 843.

Act (PMA) to reduce jail population levels would involve flushing large numbers of offenders out the back door of the state prison system, with the attendant threat to public safety and the dilution of the felony sanction because of extreme reduction in prison terms. *See*, trial of week of August 14, 1989, tr. vol. 4(A), pp. 840-861; State Defendants' Exhibit 53.

The PMA, however, has been used only as a means of complying with *Ruiz* capacity limitations since the PMA is triggered only when the population hits 95 percent of the court-ordered capacity. *See* former Tex. Gov't Code § 498.025(b).[26] *See also*, trial of week of August 14, 1989, tr. Vol. 1(A), pp. 176-77; vol. 4, pp. 676-679. It has never been used as means of controlling overcrowding in local jails. This is best illustrated by examining use of the PMA in light of the allocation formula.

Assuming a transfer-eligible population of 3,420 (the number in the Harris County jail at the time of the first trial, according to the County's witness[27]) and Harris County's current admissions allocation of 20-plus percent it would be necessary, assuming an evenhanded allocation of beds statewide, to release at least 17,000 inmates from TDCJ-ID to clear the transfer-eligible inmates out of the Harris County jail. The PMA was never intended as a means to obtain the wholesale release of convicted felons in order to clear out local jails. Rather, TDCJ-ID has used it in a prudent and reasonable fashion to comply with federal caps when they are exceeded. At the time of the first trial it had been triggered 12 times and a total of 560 days awarded. Trial of the week of August 14, 1989, tr. Vol. 4(a), pp. 855-856. If state officials are acting reasonably within the scope of their delegated functions under constitutional statutes, Eleventh Amendment analysis should bar federal judicial involvement. *See Pennhurst*, 465 U.S. at 101 n.11.

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[26]Now re-codified as Tex. Gov't Code § 499.025(b) by Vernon's Tex. Sess. Laws 1991, Reg. Session Ch. 16, § 10.01, p. 302 (eff. August 26, 1991), amended by H.B. 93, Section 17.02, p. 215.

[27]Trial of week of August 14, 1989, tr. Vol. 1(A), p. 241.

Accordingly, the limited use of the PMA as a means to control prison, not local jail overcrowding, cannot be reasonably argued as conduct establishing liability under *Wilson v. Seiter* given the state's interest in public safety and having convicted felons serve their terms. Indeed, the Fifth Circuit stayed an order that would have expedited felony releases when lesser offenders were available for release. App. C. And the *Alberti* court, no doubt with its own concerns of public safety, abandoned all release mechanisms, opting instead for ordering transfer-eligible inmates in the custody of Harris County Jail into other jails in the state. Given this history, it is difficult to hold State Defendants liable for exercising the same prudent reluctance to release convicted felons displayed by both the *Alberti* Court and the Fifth Circuit. At the very least, given their overriding concern for public safety, State Defendants' conduct should be held to the standard of "malicious or sadistic" intent in order for liability to be imposed. *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2326. However, under whatever standard imposed, State Defendants' conduct cannot justify a finding of liability under *Wilson v. Seiter*.

D. CERTIORARI SHOULD BE GRANTED TO REVERSE AN ILL REASONED AND CLEARLY ERRONEOUS RULING OF FEDERAL CONSTITUTIONAL LAW ON CAPACITY LIMITATIONS AND TO PROVIDE GUIDANCE TO THE LOWER COURTS ON THE APPROPRIATE APPROACH TO TAKE IN IMPOSING CAPS ON LOCAL JAILS OR PRISONS.[28]

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[28]Under H.B. 93, the money to pay for transferring inmates from unconstitutionally overcrowded jails is appropriated to TDCJ. H.B. 93, Section 22.01(a), p. 223. TDCJ has the power to disburse the money to the Texas Commission on Jail Standards, the agency which actually makes the payments, through interagency contracts. *Id.* Any unexpended amounts may be used for the operation of substance abuse felony facilities, H.B. 93, Section 22.01(b), p. 224, which are run by TDCJ. Accordingly, TDCJ has standing to contest artificially low population caps in local jails since they result in the unnecessary disbursal of funds from TDCJ's budget. *See Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 161 (1981).

State Defendants do not dispute the offensive and degrading conditions of confinement found in the Harris County jail at the time of trial. Still, the decision equating design capacity with constitutional capacity was precipitous and imprudent in light of this Court's traditionally deferential approach to prison and jail administration. *See e.g. Thornburgh v. Abbot*, 490 U.S. 401, 407-408 (1989); *Turner v. Safely*, 482 U.S. 78, 84-85 (1987); *Rhodes v. Chapman*, 452 U.S. 337, 351 & n. 16 (1981), *Bell v. Wolfish*, 441 U.S. 520, 540-541 n.23, 547 & n.29 (1979); *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). More specifically, this court has noted that the issue in a prison or jail case such as this "is not whether the designer of [the facility] guessed incorrectly about future prison population, but whether the conditions of confinement at [the facility] are cruel and unusual." *Rhodes*, 452 U.S. at 349-50 n.15; *see also Bell v. Wolfish*, 441 U.S. at 542 (rejecting 'one-man-one-cell' approach). Furthermore, state law standards, such as those of the Texas Commission on Jail Standards certainly cannot be dispositive in making this assessment under the Eleventh Amendment. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984); *see also Lelsz v. Kavanaugh*, 807 F.2d 1243, 1252 (5th Cir. 1987), *reh. denied*, 815 F.2d 1034 (5th Cir. 1987), *cert dism'd*, 483 U.S. 1057 (1987). Nor can the previous consent decree in this case be dispositive since State Defendants were not a party to it. *Martin v. Wilks*, 490 U.S. 755, esp. at 763 (1989).

Given this case law, the Fifth Circuit's resolution of this issue in *Ruiz v. Estelle*, 679 F.2d 1115, 1148 (5th Cir. 1982), *modified on other grounds*, 688 F.2d 266 (5th Cir. 1982) *cert. denied*, 460 U.S. 1042 (1983), where the court adopted a "wait and see" approach as to constitutional capacity levels, provides a far more appropriate compromise between constitutional interests of the inmate class and the traditional deference to be accorded prison and jail administrators. Setting caps based on design capacity is inappropriate, especially when there was substantial and credible testimony of experts (including the Special Master) that the jail could (and apparently did from February 7, 1991 to November 25, 1991) function tolerably at levels beyond

its design capacity. *See Youngberg v. Romeo*, 457 U.S. 307, 322-323 (1982) ("[W]e emphasize that courts must show deference to the judgment exercised by a qualified professional . . . [L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment"); *see also New York State Ass'n For Retarded Children v. Carey*, 706 F.2d 956, 971 (2nd Cir. 1983). And, in light of *Wilson v. Seiter, supra*, any capacity level in which defendants are not "deliberately indifferent" to the significant human needs of the inmate class is sustainable.

Because overcrowding is a persistent and wide-ranging problem nationally, this Court should grant certiorari to establish clear guidelines for the lower courts on this issue.

CONCLUSION

For all of these reasons, a writ of certiorari should be granted now and this case set for argument. Alternatively, this petition should be deferred pending review in the Fifth Circuit of the *Alberti* court's finding of deliberate indifference. State Defendants request such other relief which this Court may deem just, fair and equitable.

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